Perez v New York City Civil Serv. Commn.
2020 NY Slip Op 32177(U)
July 5, 2020
Supreme Court, New York County
Docket Number: 150665/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ, Justice — PART IAS MOTION 47EFM

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GIL V. PEREZ,

Petitioner,

- v -

THE NEW YORK CITY CIVIL SERVICE COMMISSION, ET AL.,

Respondents.

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INDEX NO. 150665/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 11-44, 66-135 were read on this motion to/for ARTICLE 78.

In this Article 78 proceeding, petitioner Gil V. Perez (Perez) seeks a judgment to overturn an order of the respondent New York City Civil Service Commission (CSC) upholding a decision by the co-respondent New York City Department of Citywide Administrative Services (DCAS), i/s/h/a the NYC Department of Citywide Administration, to terminate Perez's employment (motion sequence number 001). For the following reasons, the petition is denied and the proceeding is dismissed.

FACTS

Perez was employed by DCAS in the job title of "Stationary Engineer" from November 29, 2012 until April 26, 2016. *See* verified answer, ¶¶ 227, 322; exhibit 53. Perez had previously been employed in the job title of "Mechanical Engineer" by the non-party New York City Department of Sanitation (DSNY) from August 3, 2009, to March 5, 2010, and in the job title of "Assistant Mechanical Engineer" by the non-party New York City Housing Authority (NYCHA) from August 18, 1988, to May 5, 2003. *Id.*, ¶ 231.

Perez was appointed to his position with DCAS as a Stationary Engineer after he had taken and passed Civil Service Exam No. 8129. *See* verified answer, ¶ 227. As part of the

appointment process, Perez was required to submit a personal information statement, including his educational, criminal and employment record, called a Comprehensive Personnel Document-B form (CPD-B). *Id.*, ¶ 228. On his CPD-B form, dated December 12, 2012, Perez answered "no" to the questions "did you ever resign from a job while disciplinary action was pending against you?," and "have you ever resigned from a job to avoid termination or disciplinary action?" *Id.*, ¶¶ 228-230; exhibit 1. The initial background investigation that DCAS conducted into Perez in 2012 did not disclose any grounds to dispute those responses, and it resulted in the finding that Perez was qualified to hold the position of Stationary Engineer. *Id.*, ¶¶ 232-237.

In 2015, DCAS commenced a disciplinary investigation into Perez because a high number of complaints had been filed by clients and supervisors against him. *See* verified answer, ¶¶ 249-267. While soliciting documents from various agencies to prepare the final report of the results of that investigation, DCAS received certain employment records from DSNY and NYCHA that indicated that Perez's answers on his CPD-B form were untrue. *Id.*, ¶¶ 274-288. As a result, DCAS also commenced a second background investigation into Perez in 2015. *Id.*, ¶¶ 289-291.

During that second investigation, DCAS received more documents that indicated that Perez had supplied false information on his CPD-B form. *See* verified answer, ¶¶ 292-314. As a result, on April 4, 2016, DCAS sent Perez a Notice of Proposed Personnel Action letter that informed him of the agency's intention to disqualify him from his position as a Stationary Engineer because he had made false statements on his CPD-B form, and to terminate his employment. *Id.*, ¶¶ 316-320; exhibit 51. Thereafter, on April 26, 2016, DCAS sent Perez a Notice of Personnel Action letter that decertified his qualification to hold a position as a Stationary Engineer and terminated his employment forthwith. *Id.*, ¶¶ 321-322; exhibit 53. Perez then filed an administrative appeal of DCAS's decision with the CSC, and submitted yet more NYCHA-related documentation. *Id.*, ¶¶ 323-334. On September 21, 2016, the CSC issued

a decision that denied Perez's appeal (the CSC decision). *Id.*, ¶¶ 335-337; exhibit 58. The relevant portion of the CSC decision found as follows:

> "There is no dispute that Appellant was not obligated to state that he had been terminated from either NYCHA or DSNY on his CPD-B. However, the relevant question on the CPD-B form is not whether he had been terminated or disciplined, but whether he had resigned to avoid termination or discipline. Appellant's settlement with NYCHA permitted him to resign instead of being terminated, but did not absolve him of the obligation to provide an affirmative response to the CPD-B question, 'Have you ever resigned from a job to avoid termination or disciplinary action?' His failure to do so supports a disqualification under CSL [Civil Service Law] Sec. 50 (4) (f) for intentionally making a false statement of a material fact.
>
> "Further, the record is clear that there was no settlement in place with DSNY when he completed his CPD-B form for the position of Stationary Engineer on December 12, 2012. There is no dispute that the October 8, 2009 DSNY probation report recommended termination, that Appellant received a copy of the report and had ample time to review it, and that Appellant resigned on October 20, 2009, the same day that DSNY's Employee Review Board was to meet to consider the recommendation. Appellant did not enter into a stipulation with DSNY until March 31, 2014, and his failure on December 12, 2012, to report to his resignation in lieu of termination in 2009 further supports a disqualification under CSL Sec. 50 (4) (f) for intentionally making a false statement of a material fact.
>
> "Finally, the record supports Appellant's disqualification under CSL Sec. 50 (4) (g) for practicing deception or fraud on his application. Appellant should have answered the question 'Have you ever resigned from a job to avoid termination or disciplinary action?' honestly, and provided his explanations about what he claims were wrongful decisions by the agencies.
>
> "The Commission does not reach the merits of Appellant's reasoning concerning his separation from two employments as Appellant's false statements alone support his disqualification for fraud, falsification of employment documents, and omission of pertinent facts."

Id., exhibit 58.

Perez originally commenced this Article 78 proceeding to challenge the CSC decision on January 20, 2017. *See* verified petition. Subsequently, after the court denied respondents' prior cross motion to dismiss the original petition by decision dated November 7, 2018 (motion sequence number 001), Perez filed an amended petition on December 4, 2018. *See* verified amended petition. Respondents filed their answer on March 25, 2019, and Perez filed his reply on June 27, 2019. *See* verified answer; Cavaliere reply affirmation. This matter is now fully submitted (motion sequence number 001).

As a side matter, publicly available court records show that Perez commenced a previous action against the City of New York (the City) in this court on March 15, 2013 under Index

Number 152409/13. The City had that action removed to the United States District Court for the Southern District of New York on July 25, 2013 (hereinafter, the federal case). Thereafter, on October 15, 2015 (while he was still employed by DCAS), Perez submitted a request to DCAS, pursuant to the Americans with Disabilities Act (ADA), for a "reasonable accommodation" limiting DCAS's ability to change his work shifts as a result of alleged sleep apnea. *See* verified answer, ¶¶ 268-271. DCAS partially granted Perez's reasonable accommodation request on April 26, 2016. *Id.*, ¶¶ 272-273. Perez was evidently unsatisfied with DCAS's grant, however, and on August 25, 2016 Perez filed an amended complaint in the federal case that impleaded DCAS and asserted two claims for DCAS's alleged violations of the ADA, one claim each for DCAS's alleged violations of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), and one claim for breach of contract by the City concerning pension credits allegedly due. *See* verified answer, ¶ 338. Perez also filed an employment discrimination complaint against DCAS with the Equal Employment Opportunity Commission in October of 2016 (the EEOC case). *Id.*, ¶ 339. On March 16, 2020, the judge in the federal case (Gardephe, J.) issued a decision that dismissed Perez's ADA claims and directed that his NYSHRL, NYCHRL and breach of contract claims be remanded to this court. *See Perez v City of New York,* 2020 WL 1272530 (SD NY, March 16, 2020, 16-Civ-7050 [PGG], *appeal filed* [2dCir, April 16, 2020]). However, those claims are not part of this proceeding, but are instead part of the action entitled *Perez v City of New York* bearing Index Number 152409/13. The current status of Perez's EEOC case is unknown, but those claims are not part of this proceeding either. This decision deals solely with Perez's Article 78 challenge to the CSC decision.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*

of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). An administrative determination is only arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Of particular relevance to this case, the Appellate Division, First Department, held in *Matter of City of New York v New York City Civ. Serv. Commn.* that, "[a]s the agency having both policy-making authority and functional responsibility for Civil Service matters in New York City, DCAS has the power to investigate and determine the qualifications of applicants for Civil Service positions." 20 AD3d 347, 347-348 (1st Dept 2005), *affd* 6 NY3d 855 (2006). The First Department also recognizes that, "[o]n the other hand, the [CSC] is not empowered to decide . . . matter[s] de novo, [and] the only powers reserved to it . . . [are] those of an appeals board to hear and decide appeals by persons aggrieved by DCAS's determinations" *Id.*, 20 AD3d at 348; *see also Matter of Department of Personnel of City of N.Y. v New York City Civ. Serv. Commn.*, 79 NY2d 806 (1991). Here, respondents argue that the CSC correctly applied the above standard in its September 21, 2016 order to uphold DCAS's decision to decertify and terminate Perez's employment. *See* respondents' mem of law at 7-14. The court agrees.

In its order, the CSC found that DCAS correctly applied the following relevant portions of CSL § 50 to its review of Perez's CPD-B form:

"4. <u>Disqualification of applicants or eligibles</u>. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible applicant

* * *

(f) who has intentionally made a false statement of any material fact in his application; or

(g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment;"

CSL § 50 (4) (f) & (g); verified answer, exhibit 58. The administrative record shows that these were indeed the statutory provisions that DCAS relied on in the appellate report that it submitted to the CSC as part of its response to Perez's challenge to DCAS's termination decision. *Id.*, exhibit 55. Perez does not challenge that CSL § 50 (4) was the applicable governing statute; rather, he argues that "[w]here applicants make true statements, and all facts are available, agencies are time barred from terminating based on Rule 50.4 after 36 months from appointment." *See* petitioner's reply mem of law at 21-27. However, this argument merely challenges the weight that DCAS gave to Perez's assertions of his alleged truthfulness on his CPD-B form. It does not assert that DCAS should have used some statute other than CSL § 50 in its analysis of Perez's CPD-B form. The court's own research indicates that CSL § 50 (4) was indeed the correct governing statute to apply. Therefore, the CSC made the correct legal judgment by relying on CSL § 50 (4) in its September 21, 2016 order.

The CSC order also recounted the evidence in the administrative record that DCAS had relied on during its review of Perez's appeal; which included: 1) Perez's CPD-B form; 2) all of the documents concerning Perez's employment with, and subsequent separation from, DSNY; and 3) all of the documents concerning Perez's employment with, and subsequent separation from, NYCHA. *See* verified answer, exhibit 58. The CSC order further noted that Perez's counsel had presented all of the DSNY-related material to DCAS during the first administrative appeal of its termination decision, but that counsel only disclosed all of the NYCHA-related material that DCAS had requested to the CSC itself during Perez's subsequent appeal of DCAS's decision to the CSC. *Id.* The CSC asserts its decision to uphold DCAS's determination was correct, because it was based on the "entire record," which included both the DSNY documents that Perez disclosed to DCAS and the complete NYCHA documents which Perez later disclosed to the CSC. *Id.* Perez's reply papers do not allege that the administrative record was incomplete or that the CSC excluded any evidence. Rather, Perez argues that DCAS submitted a

"misleading record" during the appeal to the CSC in order to improperly induce the CSC to "reach two [different] conclusions from the same file." *See* petitioner's reply mem of law at 16-28. However, when parsed closely, Perez's somewhat disjointed argument is based on the assertion that DCAS sought to use the "same" evidence that it reviewed in his 2013 background investigation to request a "different" result in the 2016 appeal to the CSC. *Id.* This assertion is rejected for two reasons. First, it is demonstrably untrue. The administrative record shows that Perez disclosed to the CSC certain documents concerning his employment with, and separation from, NYCHA which his counsel had declined to provide during Perez's 2013 background investigation. Second, Perez does *not* argue that there was any relevant evidence missing from the CSC's administrative record, or that the CSC improperly declined to consider any of the evidence that was submitted. Thus, he raises no challenge to the contents of the administrative record. Therefore, the CSC was justified basing its September 21, 2016 order on the evidence from the administrative record which it described in the order.

Finally, the CSC order asserted that DCAS's termination decision was rationally based on the evidence in the administrative record. *See* verified answer, exhibit 58. In particular, it found that: 1) the fact that Perez did not execute an employment separation settlement with DSNY until March 31, 2014 meant that, when he executed the CPD-B form two years earlier on December 12, 2012, he was still obligated at that time to answer the question "have you ever resigned from a job to avoid termination or disciplinary action?" in the affirmative; and 2) even though Perez's 2003 separation agreement with NYCHA provided that NYCHA would rescind his termination and allow him to retroactively resign, it did not absolve him from answering the question "have you ever resigned from a job to avoid termination or disciplinary action?" in the affirmative on his 2012 CPD-B form. *Id.* What is germane to this proceeding is that the CSC found that DCAS's decision to disqualify and dismiss Perez from employment was rationally based on the contents of the these documents. The CSC now reasserts that that decision was a correct one. *See* respondents' mem of law at 11-26. In response, Perez cites a great quantity of

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off-point case law to support a number of arguments as to why the CSC should not have based its decision on anything other than the results of his 2013 background investigation, and why the CSC should have reached the same conclusion DCAS reached in the earlier investigation; i.e., that Perez should not have been decertified from employment. *See* petitioner's mem of law at 16-28. However, Perez's arguments that the CSC should have found that the evidence mandated a different result than the one that DCAS arrived at misconstrues the CSC's role and authority. As was previously observed, the CSC is not empowered to decide matters de novo, because the only powers reserved to it are those of an appeals board. *Matter of City of New York v New York City Civ. Serv. Commn.*, 20 AD3d at 348. Perez's arguments are improper because they allege that the CSC should have performed a de novo review of DCAS's decision, even though the law forbade it from doing so. Instead, the law required the CSC to act as an "appeals board;" i.e., a body empowered to determine whether DCAS had demonstrated a rational basis for its administrative determination or had acted arbitrarily and capriciously. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. The CSC's September 21, 2016 order simply found that the evidence in the administrative record provided a rational basis for DCAS's termination decision, and that, for that reason, DCAS's termination decision should be upheld. All of Perez's scattershot arguments miss the mark, because none of them includes an explanation as to how the CSC failed to adequately discharge its function as an "appeals board." Therefore, Perez's arguments are rejected because the CSC correctly found a rational basis in the administrative record to support DCAS's decision to decertify Perez from his position as a Stationary Engineer, and to terminate his employment.

In conclusion, the court finds that the CSC's order correctly identified the controlling law, identified and analyzed all of the evidence in the administrative record, and determined that the evidence afforded a rational basis to justify the DCAS decision from which Perez was appealing. Accordingly, because Perez has failed to demonstrate that the CSC's September 21,

2016 order was arbitrary and capricious, his petition should be denied, and this Article 78 proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Gil V. Perez (motion sequence number 001) is denied, the petition is dismissed and the clerk is directed to enter judgment accordingly

7/6/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	X	DENIED		GRANTED IN PART		OTHER
		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE